IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, *et al., Petitioners,*

v.

ANNA BARRERA, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is being filed in support of the respondents with the consent of the parties.

QUESTIONS PRESENTED

1. Whether Congress directed in Title I of the Elementary and Secondary Education Act of 1965 that local agencies providing special educational services to disadvantaged children provide equal services to stu-

dents in private sectarian schools as are provided for students in the public schools.

2. Whether implementation of such a standard of equality by sending specialized-service instructors—paid directly by the local agency and responsible only to its officials—onto the premises of private sectarian schools violates the Establishment Clause of the First Amendment.

INTRODUCTION AND INTEREST OF THE AMICUS

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of lawyers and social scientists who volunteer their professional services to assist observant Jews in exercising religious rights. We have appeared in many administrative and judicial forums on behalf of those invoking the right to free exercise of religion under the First Amendment, and have filed *amicus* briefs in this Court in numerous cases involving such rights—irrespective of the particular faith professed by the party before the Court. With great dismay, we have witnessed, over the past several Terms, an increasing rigidity on the part of a Court majority with regard to private-school financing—a rigidity which, we believe, was not contemplated by the draftsmen of the "majestic generalities" of the First Amendment and which conflicts with the realities of our times. The effect of this Court's decisions has been to disable private sectarian education in this country by placing it—virtually alone of all social services offered in our society—beyond the helping hand of the otherwise omnipresent public treasury. We fear that these judicial rulings may strangle private religious education in this nation—thereby seriously jeopardizing the

vitality of the diverse creeds which are the glory of the United States and which demonstrate to free societies everywhere the blessings of liberty.

This case, in our view, may mark another major step along this damaging course. Congress has recognized that many of the disadvantaged children who should be beneficiaries of Title I of the Elementary and Secondary Education Act are enrolled in nonpublic schools, and it has specifically directed that local agencies must give equal participation in any Title I project to those children. This case tests whether the standard of equality, when mandated by Congress, means *real* equality rather than merely adherence to a verbal formulation, and whether the legislative effort to give such meaningful assistance is to be wiped away on the formalistic ground that the Establishment Clause forbids public officials, supervised entirely and paid directly by the secular authority, from entering into and performing their services in a building owned by a sectarian agency and devoted, during part of the day, to sectarian purposes.

The position taken in this brief is supported by the following national Jewish organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of
Hebrew Day Schools
Union of Orthodox Jewish
Congregations of America

ARGUMENT

I

The Statute and the Regulations Require Real Equality and Comparability Between the Services Given Public School Students and Those Given to Private Schools

More than two decades ago, this Court was being told by the school authorities of various jurisdictions that black students and white students could be treated equally while they remained separate. The Court rejected that position, finding that there was inherent inequality in the compelled separation. Today, the Court is again being told that what is, almost by definition, unequal is really sufficient to satisfy a legislative and regulatory command of equality and comparability. Students at sectarian schools, the district judge said, "can receive their equitable mathematical share of the funds available in after-school or summer school programs" (Pet. App. A43), even though public school children receive instruction during the regular school day, in their regular classrooms, from special teachers who are qualified to instruct in remedial subjects.

The court of appeals correctly read the statute and the regulations as requiring that the same in-school remedial program be offered to disadvantaged children enrolled in private schools as is given to similarly disadvantaged children in the public schools. The relevant statutory provision, 20 U.S.C. §241e(a), fixes six absolute preconditions to any grant under Title I (as well as five other conditions applicable only to specified types of projects). The second of these preconditions is that the local agency *must* show that it "has made provision" for the participation of eligible children enrolled in nonpublic schools. Although the

statute does not explicitly use an equality or comparability standard, the regulations issued by the Office of Education—by which that agency and all local units are bound—requires that the services for private-school enrollees be "on a basis comparable to that used in providing for the participation in the program by deprived children enrolled in public schools." 45 C.F.R. §116.19. And the Commissioner of Education's Program Guide—quoted extensively by the court of appeals (Pet. App. A7)—prescribes that private school "services and activities . . . must be comparable in quality, scope, and opportunity for participation to those provided for public school children . . ."

In short, all the formal pronouncements direct that equality be the touchstone. A summer-school or after-school program (which patently is less effective in capturing the child's attendance and attention) is plainly not the equivalent of a remedial teacher's presence and instruction in the child's regular school building during his regular school day. Accordingly, the court of appeals properly held that the Missouri authorities were required by overriding federal standards to send their remedial teachers and teacher aides into the private schools for comparable instruction if they are to continue to receive Title I funds.

II

The Presence of a Public-School Remedial Teacher, Responsible Only to Secular Authorities, in a Sectarian-School Building to Give Remedial Instruction to Students at the Secretarian School Does Not Violate the Establishment Clause.

The remaining question is whether the Constitution forbids implementation of the legislative and administrative directives that public and private school children be treated equally. The argument that it does is

based principally on *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), where this Court invalidated local statutes under which teachers of secular subjects at sectarian schools were paid directly out of state treasuries. The Court's concern in *Lemon* was that teachers who were interviewed, hired and supervised by the religious authorities who operate sectarian schools and who would probably be "dedicated religious" people affiliated with the religion taught at the schools "would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 617-619. It was this "potential" that led the Court to conclude that tax funds would probably end up being used to inculcate religion—or, if the secular authorities sought to police the instruction to prevent such a phenomenon, the result would be "comprehensive, discriminating, and continuing state surveillance." 403 U.S. at 619.

A program of the kind involved in this case presents no similar dangers. The remedial teachers are on the public payroll, responsible only to the public-school authorities. Not only are they not "dedicated religious" people; they will probably, in most instances, not even be of the same religious faith as the students they are teaching. Nor is there a real possibility that they will gear their instruction to religious tenets since the easiest and most probable approach would be to teach in the sectarian school from the same materials and in the same manner as they teach, contemporaneously, in the public schools.

What similarity, then, remains between the Title I program that would be administered in Missouri (or other jurisdictions) if the decision below were affirmed and the program invalidated in *Lemon*? Only

that both are taught on the sectarian school's premises. But to make a vital constitutional holding—possibly the last life-line of parochial school education in the United States—turn on this ritualistic distinction would be ironic. Does a fireman become a religious functionary if he enters a sectarian school to quench a blaze? Do state health inspectors or nurses infringe First Amendment liberties if they perform health or medical functions on church property? Why should a remedial teacher—whose sole mission is to bring deprived children up to par in secular learning ability—be presumed to be furthering religion if he or she steps into a church school to carry out that function? The building no more contaminates such a teacher than it would a textbook, and here, as in *Board of Education* v. *Allen,* 392 U.S. 236, 248 (1968), there is no evidence whatever that the facility offered by the state could be "used by the parochial schools to teach religion."

Americans United for Separation of Church and State v. *Oakey,* 339 F.Supp. 545 (D. Vt. 1972), is a decision which, to be sure, lends some support to the petitioners' position—although it can be distinguished on the ground that it concerned regular classroom teachers and not remedial instruction. Not to be ignored in that decision, however, is the brief but moving concurrence of Circuit Judge Oakes, who joined the result only because he felt compelled to do so by this Court's ruling in *Lemon.* Judge Oakes expressed concern that "the inevitable result" of these cases would be "the ultimate demise of the parochial school in America." 339 F.Supp. at 553. He went on to say (*ibid.*):

> To me, this would be a most unfortuate result. Ours has been a pluralistic society, fostering creativity out of multiple peoples, religious and philo-

> sophical systems of thought, and ethnic ties. *Cf.* R. Niebuhr, A Note on Pluralism, in Religion in America 42 (1958). In the advancement of this pluralistic society, the parochial school system has played a not insignificant part. *Lemon*, I fear, will tend toward a homogenization of American education. . . .

CONCLUSION

The court of appeals was correct in its reading of the statute, and it should have sustained the constitutionality of a remedial education program under which public-school teachers would provide instruction on the premises of sectarian schools. The judgment should be affirmed on the above grounds.

Respectfully submitted,

NATHAN LEWIN
1320 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 293-6400
Attorney for Amicus Curiae